FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 31 2017

Hon. Christopher Van Hollen, Jr.
110 Hart Senate Office Building
Washington, DC 20510

RE: MUR 7024
Christopher Van Hollen, Jr.

Dear Hon. Van Hollen:

On March 23, 2016, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 25, 2017, the Commission found, on the basis of the information in the complaint and the responses, that there is no reason to believe that you violated 52 U.S.C. §§ 30104(b), 30116(f), or 30118(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Antoinette Fuoto, the attorney assigned to this matter at (202) 694-1634.

Sincerely,

Lynn Y. Tran
Assistant General Counsel

Enclosure
Factual and Legal Analysis

17044274372

May 23, 2017

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Van Hollen for Senate
Van Hollen for Congress
Stacey Maud in her official capacity as treasurer
Christopher Van Hollen, Jr.
Democracy 21
The Campaign Legal Center
Wilmer Cutler Pickering Hale and Dorr LLP

MUR: 7024

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I. INTRODUCTION

The Complaint in this matter alleges that Democracy 21, The Campaign Legal Center ("CLC"), and Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer Hale") provided in-kind contributions in the form of *pro bono* legal services to then-Representative Christopher Van Hollen in violation of the source prohibitions and amount limitations of the Federal Election Campaign Act of 1971, as amended (the "Act"). The Complaint further alleges that Van Hollen violated the Act by receiving those services and by failing to disclose them as contributions in reports filed with the Commission. The Respondents deny the allegations.

Because the evidence available in the record before the Commission does not establish that the legal services at issue were contributions, or provide a sufficient evidentiary basis to make such an inference, the Commission finds no reason to believe that the Respondents violated the Act as alleged.

II. FACTS

Van Hollen was elected to the United States House of Representatives in 2002, and served as the representative for the 8th District of Maryland through 2016.[1] In 2015, he

[1] Compl. ¶ 14 (Mar 16, 2016).

announced his candidacy for the United States Senate.[2] The Complaint alleges that Van Hollen "presented himself as a champion of campaign finance reform" and "made the issue of more donor disclosure a centerpiece of his policy initiatives and campaign rhetoric."[3]

In 2011, Van Hollen filed a rulemaking petition with the Commission regarding the disclosure of independent expenditures.[4] The same year, he also filed a lawsuit challenging a Commission regulation governing the disclosure of electioneering communications.[5] In his complaint against the Commission, Van Hollen described himself as a "future candidate for federal office" and a "fundraiser" as well as a sitting member of Congress.[6] He asserted a "protected interest in participating in elections untainted by expenditures from undisclosed sources for 'electioneering communications,'" and stated that he was a likely target of advertisements "financed by anonymous donors, and [would] not be able to respond by . . . drawing to the attention of voters in his district the identity of persons who fund such ads."[7] In a press release announcing the lawsuit, Van Hollen stated that he would "continue to press for greater donor disclosure in the courts, and in Congress, in order to bring in the much-needed sunlight."[8]

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2 *Id.* Van Hollen was elected to the United States Senate in 2016.

3 *Id.* ¶ 3, n.1 (quoting description of Van Hollen as "the leading force in the U.S. House of Representatives for campaign finance reform" appearing in media report).

4 *Id.* ¶ 18; *id.* Ex. 5 (Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011)).

5 *Id.* ¶ 18; *id.* Ex. 4 (Complaint, *Van Hollen v. FEC*, No. 11-766, 851 F. Supp. 2d 69 (D.D.C. Apr. 21, 2011)).

6 *Id.* ¶ 19.

7 *Id.*

8 *Id.* Ex. 3 (Press Release, Chris Van Hollen, *Van Hollen Files Lawsuit Challenging FEC Regulations* (Apr. 21, 2011)).

Van Hollen received *pro bono* legal services in the lawsuit and rulemaking proceedings from Democracy 21 and CLC,[9] and in the lawsuit from Wilmer Hale.[10] Wilmer Hale is a law firm and a limited liability partnership that has provided *pro bono* services in "numerous campaign finance cases for three decades."[11] Democracy 21 and CLC are nonprofit organizations with a history of advocacy in campaign finance.[12]

The Complaint alleges that the *pro bono* legal services that Van Hollen received in connection with the lawsuit and rulemaking petition constitute contributions under the Act worth "hundreds of thousands of dollars."[13] The Complaint asserts that Wilmer Hale's legal services exceeded the Act's contribution limits for partnerships, and that Van Hollen violated the Act by accepting those services.[14] Additionally, the Complaint alleges that the legal services provided by Democracy 21 and CLC are prohibited corporate contributions, and that Van Hollen violated the Act by accepting those services.[15] The Complaint further alleges that Van Hollen violated the Act by not disclosing the value of the *pro bono* services as contributions in his committees' reports to the Commission.[16]

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[9] Democracy 21 and CLC Resp at 2; *id.* Ex. I (Fred Wertheimer Aff. ¶ 4 (May 9, 2016)); *id.* Ex. J (Gerald Hebert Aff. ¶ 4 (May 9, 2016)).

[10] Compl. ¶ 17; Wilmer Hale Resp. at 3; Wilmer Hale Resp. Ex. A (Roger Witten Aff. ¶¶ 6-9 (Aug. 23, 2016)). The Complaint makes passing reference to other sources from whom Van Hollen may have received *pro bono* legal services — specifically, Public Citizen and the law firm of Sonosky, Chambers, Sachse, Endreson & Perry LLP. Compl. ¶ 17 & n.22. The Complaint's specific allegations, however, focus on services provided by CLC, Democracy 21, and Wilmer Hale.

[11] Witten Aff. ¶¶ 3; 9.

[12] *See, e.g.*, Wertheimer Aff. ¶¶ 3-4; Hebert Aff. ¶¶ 3-4.

[13] Compl. ¶ 7.

[14] *Id.* ¶ 36.

[15] *Id.* ¶ 35.

[16] *Id.* ¶ 37.

III. LEGAL ANALYSIS

The Act defines "contribution" to include "any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office."[17] "Anything of value" includes the "provision of . . . services without charge."[18] The Act limits the amount of contributions that partnerships may make to candidates,[19] and prohibits corporations from making contributions to candidates.[20] Moreover, political committees must regularly file reports disclosing their receipts, including in-kind contributions.[21] The *pro bono* services provided by Wilmer Hale, Democracy 21, and CLC would be contributions, and thus subject to the source prohibitions, amount limitations, and reporting requirements of the Act, if they were made "for the purpose of influencing" a federal election.

The evidence in the record before the Commission does not establish that the legal services at issue were provided for the purpose of influencing a federal election. Indeed, Wilmer Hale, Democracy 21, and CLC specifically deny that they provided legal services to influence any election and have submitted affidavits to that effect.[22] Wilmer Hale asserts that it represented Van Hollen for the "sole purpose" of "challeng[ing] the relevant FEC regulation in

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17 52 U.S.C. § 30101(8)(A). In the context of corporations, the Act also defines contribution as "anything of value" given "to any candidate, campaign committee, or political party or organization, in connection with any election . . . ." 52 U.S.C. § 30118(b)(2).

18 11 C.F.R. § 100.52(d)(1).

19 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

20 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

21 52 U.S.C. § 30104(b)(2)-(3); 11 C.F.R. §§ 104.3(a)(3)-(4), 100.52(d)(1).

22 *See* Wertheimer Aff.¶ 4 ("Democracy 21 . . . is not seeking to influence the outcome of any particular election."); Hebert Aff. ¶ 4 (same, as to CLC); Witten Aff. ¶ 9 (Wilmer Hale "had nothing whatsoever to do with Rep. Van Hollen's election campaign," and "it was not [the firm's] purpose or intent to do so.").

court."[23] Democracy 21 and CLC similarly state that each organization's "purpose in participating in these matters is to further its longstanding organizational goals — in particular, the proper interpretation and administration of campaign finance laws."[24] They further assert that Van Hollen served as plaintiff "to guarantee standing under D.C. Circuit law and thus avoid any potential jurisdictional issues that might have otherwise hindered . . . efforts to pursue a legal challenge to the regulations at issue."[25]

Moreover, the stated purpose of Van Hollen's lawsuit and rulemaking petition was to challenge Commission regulations regarding the disclosure of electioneering communications and independent expenditures.[26] Although the outcome of these actions could potentially have had an effect on candidates in future elections, the effect on any particular candidate's election would be too indirect and attenuated to constitute a contribution. In this respect, the actions are similar to redistricting litigation, which the Commission noted "often has political consequences," but the "spending on such activity is sufficiently removed that it is not 'in

[23] Witten Aff. ¶ 9.

[24] Hebert Aff. ¶ 4; Wertheimer Aff. ¶ 4.

[25] Democracy 21 and CLC Resp. at 12-13 (May 9, 2016). The complaint in *Van Hollen v. FEC* refers to Van Hollen variously as "a Member of the United States House of Representatives" who "is planning to run for re-election"; "a United States citizen, elected Member of Congress, candidate for re-election to Congress, voter, recipient of campaign contributions, fundraiser, and member of national and state political parties" "who faces personal, particularized, and concrete injury from the FEC's promulgation of a regulation . . . that is contrary to the letter and spirit of the" Bipartisan Campaign Reform Act; a "federal officeholder" and "future candidate for federal office" who is "and will be regulated by the [Act] and BCRA"; and "a citizen and voter" with "an informational interest in disclosure." Compl., Ex. 4 (Complaint, *Van Hollen v. FEC*, ¶¶ 9-11). The Commission does not consider the mere reference to Van Hollen's status as a current or potential future candidate in order to establish standing before the tribunal to be relevant to the question of whether a contribution was made.

[26] *See* Compl. Ex. 4 (Complaint, *Van Hollen v. FEC*, ¶¶ 1-6, 37); *id.* Ex. 5 (Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures).

connection with' the elections themselves."[27] Because of the absence of any objective or subjective indication that Wilmer Hale, Democracy 21, or CLC offered *pro bono* services for the purpose of influencing an election, the Commission finds that the legal services were not contributions.

The Complaint nonetheless asserts that the legal services were contributions because they were "of direct benefit to the campaigns of a candidate for federal office."[28] As noted above, the question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen's campaign. But even if that were the standard, the Complaint's reliance on Advisory Opinion 1990-05 (Mueller) is misplaced, given the many material factual differences between that advisory opinion and the instant matter. In Advisory Opinion 1990-05 (Mueller), the Commission addressed the unusual "question of whether candidate involvement is campaign related . . . in the factual context of activity sponsored or funded by the candidate personally."[29] The Commission identified a number of factors tying the candidate's newsletter to her campaign, and concluded that the candidate's expenses in publishing and distributing editions of her newsletter would be expenditures if they had "campaign-related content" or were otherwise used as campaign

[27] Advisory Op. 2010-03 at 4 (Nat'l Democratic Redistricting Trust); *see also* Advisory Op. 1990-23 (Frost) (money raised and spent by entity other than political committee to pay legal expenses related to redistricting and reapportionment not contribution or expenditure); Advisory Op. 1983-37 (Mass. Democratic State Comm.) (money raised and spent by legal expense fund to pay expenses for legal challenge to party rules regarding ballot access not contribution or expenditure); Advisory Op. 1983-30 (Joyner) (same, for costs of challenging state constitutional provision); Advisory Op. 1982-37 (Edwards) (same, for legal expenses in connection with reapportionment); Advisory Op. 1982-35 (Hopfman) (same, for challenge to party rule regarding ballot access); Advisory Op. 1981-35 (Thomas) (same, for expenses related to reapportionment); *cf.* Advisory Op. 1980-57 (Bexar County Democratic Party) (concluding that litigation to remove opponent from ballot was for purpose of influencing federal election since object of lawsuit was to eliminate electorate's opportunity to vote for opponent).

[28] Compl. ¶ 17.

[29] Advisory Op. 1990-05 (Mueller) at 2.

communications.[30] By contrast, the information in the record before the Commission here does not establish that the legal services directly benefited Van Hollen's campaign.

Finally, the Complaint asserts that the legal services were contributions because they were provided to Van Hollen's political committees.[31] The information in the record does not support this claim. To the contrary, the documentation provided with the Complaint contradicts the claim,[32] and it is further explicitly denied by Wilmer Hale, Democracy 21, and CLC.[33] Accordingly, the Commission concludes that there is no reason to believe that the legal services were provided to a political committee.

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[30] *Id.* at 4. The Commission noted, for example, that the newsletter was "originated, sponsored, implemented, and funded by" the candidate, inspired by her experiences as a candidate, was "sent primarily to . . . potential supporters of [her] candidacy," that individuals involved in the campaign were also involved in publishing the newsletter, and that it covered issues such as "the makeup of Congress." *Id.*

[31] The Act defines "contribution" as including "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 52 U.S.C. § 30101(8)(A)(ii). *But see, e.g., id.* § 30101(8)(B)(viii) (exempting certain legal services rendered solely to ensure compliance with the Act); Advisory Op. 2011-01 (Carnahan for Senate) (concluding that donations to legal defense fund to defray authorized committee's legal costs are not contributions).

[32] For example, the complaint in *Van Hollen v. FEC* listed Van Hollen (and not his campaign committee) as the plaintiff (Compl., Ex. 4); Van Hollen was the sole petitioner in the rulemaking (*id.*, Ex. 5); and press releases regarding the proceedings were issued by Van Hollen's congressional office and not by his campaign committees (*id.*, Exs. 1, 3, 14).

[33] *See, e.g.*, Democracy 21 and CLC Resp. at 20 (asserting that they worked with Van Hollen and his House of Representative staff (as opposed to his campaign staff) in connection with the proceedings); Wilmer Hale Resp. at 6 (stating, "Van Hollen himself is the only plaintiff in the lawsuit, and his campaign committee was not a party and had no involvement in the proceeding. Moreover, Wilmer Hale does not represent Van Hollen's campaign committee for any purpose."); Witten Aff. ¶ 8 (stating, "All of my and WilmerHale's dealings on these matters were with Rep. Van Hollen and his congressional staff, and there were no dealings with his campaign committee or campaign staff. All of my and WilmerHale's communications with Rep. Van Hollen and his congressional staff related exclusively to the litigation, and WilmerHale has had no communications with them about Rep. Van Hollen's election campaign."; stating that the firm's "client has been Rep. Van Hollen and no other person or entity," that it "represents him personally and not as a candidate," and that it "does not and never has represented Rep. Van Hollen's campaign committee in connection with these or any other matters."); Hebert Aff. ¶ 5 (stating that during CLC's "participation in these matters, our client has been [Van Hollen]," and CLC does "not represent Representative Van Hollen's campaign committee in connection with [the rulemaking or lawsuit]"); Wertheimer Aff ¶ 5 (same, as to Democracy 21).

In sum, the information in the record indicates that Wilmer Hale, Democracy 21, and CLC provided the legal services at issue here to Van Hollen and not to a political committee, for the purpose of challenging a rule of general application, not to influence a particular election. Given the lack of support in the record for the allegations in the Complaint, the Commission concludes that the *pro bono* legal services provided by Wilmer Hale, Democracy 21, and CLC were not contributions under the Act. Accordingly, the Commission finds no reason to believe that Wilmer Hale violated 52 U.S.C. § 30116(a), that Democracy 21 or CLC violated 52 U.S.C. § 30118(a), or that the remaining Respondents violated 52 U.S.C. §§ 30104(b), 30116(f), or 30118(a).